In the High Court of Judicature at Madras

Dated: 09/09/2003

Coram

The Honourable Mr.Justice V.KANAGARAJ

Crl.R.C.No.1140 of 2003
and
Crl.M.P.Nos.7410 and 7411 of 2003

M.Sathiamoorthi ... Petitioners

-Vs-

STATE
rep.by SPE/CBI/ACB,
Chennai. ... Respondent

Prayer: Revision is filed under Section 397 and 401 of Code of Criminal Procedure for the relief stated therein.

For petitioner : Mr.K.S.Dinakaran

For respondent: Mr.N.Renganathan
Spl.Public Prosecutor for CBI

:O R D E R

Petitioner as accused No.3 in C.C.No. 25 of 2001 has filed the above criminal revision case against the order dated 10.04.2003 passed in Crl.M.P.No.108 of 2001 in C.C.No.25 of 2001 by the Court of Special Judge for CBI Cases cum IX Additional Sessions Judge, Chennai.

2. The petitioner has filed the Crl.M.P.No.108 of 2001 under Section 91 of Code of Criminal Procedure seeking production of the documents referred to in the petition.

3. The prosecution case is that the petitioner/A3 was involved in a criminal conspiracy between 1995-96 at Chennai, Trichy, Nagapattinam, Red Hills and other pleas to commit criminal misconduct and cheat the Government of India and Government of Tamil Nadu in the matter of construction/erection of cremation sheds under JRY schemes by using JRY funds and in pursuance of the conspiracy the petitioner/A3 initiated the proposal on 21.06.1995 for the said construction and erection of cremation sheds under JRY at an exorbitant rate of Rs.30,000/- per shed which was far above the actual cost of construction and A2 accepted the said proposal on 28.06.1995 and

included the names of seven societies for executing the said work against the guidelines of JRY and also included the clause for the payment of 50% advance in total violation of G.O.Ms.No.708 dated 22.08.1994 and A2 forwarded the proposal dated 28.06.1995 directly to A1 without sending the same through proper channel. A1 approved the proposal on the same day that is on 28.06.1995 knowing fully well that the construction of cremation sheds was not an identified item in JRY and such work should not be entrusted to the middlemen. A4 issued the work order in favour of Karungulam Co-operative Society knowing full well that the construction /erection of cremation sheds in Nagapattinam would be done by A6 in the name of such society and recommended payment of 50% advance suppressing the fact that no bank guarantee was produced and issued demand drafts in favour of the society. A5 facilitated A6 in the encashment of the demand drafts, A6 who was not even a member of the said society executed the work of erection/construction of cremation sheds in the name of the society in a sub standard manner and not in conformity with the specifications through the sub constructors and thereby A1 to A4 abused their official position in collusion with A5 and A6and caused wrongful loss to the Government to the extent of Rs.23/lakhs and, therefore, according to the prosecution A1 to A6 are liable to be punished for the offence under Section 120-B read with 420 IPC and 13 (2) read with 13(1)(d) of P.C.Act and substantive offences thereof.

4. The Court below after considering the materials on record both oral and documentary, came to the conclusion that the documents enumerated in the petition are not very much essential for establishing his case at this stage and dismissed the petition filed by the petitioner under Section 91 of Code of Criminal Procedure.

5. Heard both sides.

6. Though the above subject had already been heard once, under preliminary conclusion arrived at to permit the petitioner to have access to certain documents, still at the time of pronouncing the order since this Court thought it fit to get certain vital aspects clarified regarding the reliability of the said documents by the prosecution and the essentiality of those documents for the perusal of the petitioner and as to from whom they have to be sent for, the case was again posted for clarification for upon hearing the learned counsel for both fully, conclusions are arrived at.

7. During arguments learned counsel appearing on behalf of the petitioner would not only reiterate but as being traced in the grounds of the above criminal revision case but also would lay emphasis on the section 91 of the Code of Criminal Procedure and the vitality of the documents sent for to prove the case of the petitioner further assailing the reason assigned by the trial Court dubbing those documents as privileged ones stating that the privilege if any could be claimed by the heads of department from whose custody the documents are required to be produced and that it is not every communication which is privileged but barring only the communication made in official confidence.

8. Continuing to argue the learned counsel would point out that the

copies of the documents mentioned in paragraph 1a, b and c in his petition in Crl.M.P.No.108 of 2001 are not made available to the petitioner which are vital to establish the innocence of the petitioner particularly in view of the specific charge of the prosecution that in the construction of the cremation sheds the petitioner fraudulently ordered payment of 50% as advance in violation of G.O.M.No.708 Finance Department dated 22.08.1994, that the said Government Order is not applicable to the facts of the case since the advance payment ordered was only subject to the production of the bank guarantee for the said amount and since the prosecution heavily relies on the said Government Order, the documents pertaining to the issuance of the said Government Order are absolutely necessary and essential to establish the innocence of the petitioner.

9. Likewise regarding the other documents, Accountant General's Audit report relating to JRY scheme for the year 1995-1996, the prosecution itself has admitted that the said report is a belated one and does not contain any fraudulent act committed by the petitioner; that the Auditor General of India did not indict the petitioner and the case registered by the prosecution is only based on extraneous considerations and, therefore, the production of the said document is vital to prove the innocence of the petitioner.

10. Likewise also commenting on the other documents relating to Writ Petition in W.P.No.17419 of 1996 giving importance of the same the learned counsel would clamour not only for necessary orders and directions to be issued to all concerned about but also to set aside the order dated 10.04.2003 made in Crl.M.P.No.108 of 2001 in C.C.No.25 of 2001 on the file of the Court of Special Judge for CBI cases cum IX Additional Sessions Judge, Chennai.104 allowing the above criminal revision case.

11. On the contrary, the learned Special Prosecutor CBI cases appearing on behalf of the respondent State would dismiss not only the contents and the prayer of the petition but also supportive arguments advanced on the part of the learned counsel for the petitioner lock stock and barrel stating that none of these documents sought to be sent for and caused production of are relied upon by the prosecution and only as a dilatory tactic such an unwanted exercise has been undertaken on the part of the petitioner. Commenting on each and every document sought to be sent for, the learned Special counsel for the respondent State would assail the argument of the petitioner that none of the documents need be sent for except document No.4A, listed in the petition which is in their control and those documents relied upon by them for the proof of the case have been collected and filed before the Court and they form part of the records and the petitioner is at liberty to peruse the same with the permission of the Court.

12. So far as the first document listed there is concerned the learned counsel would reveal that it is not under the control of the Secretary to Government of Tamil nadu Rural Development Department but under the control of the Secretary to Government of Tamil Nadu Khadi and Village Board who is not a party to the proceeding either before this Court or before

the trial Court and that the respondent has no control over the same.

13. Likewise document Nos.2 and 3 are also with the concerned Secretaries of Adi Dravidar and Tribal Welfare Department and the Finance Department, respectively and the petitioners could obtain the same applying for the copies with them.

14. So far as document No.4 is concerned though it is admitted that it is the only document in their control, still, the same has been filed into Court and the petitioner is at liberty either to peruse the same or obtain the copy application applying for the same in the manner prescribed by law.

15. So far as the petition is concerned with the other documents in items 4 b, c and d, they are relating to the writ petition in W.P.No.17419 of 1996 on the file of the High Court of Judicature, Madras and the petitioner is at liberty to apply for copies and obtain certified copies of the same and, therefore, while such being the state of affairs connected to the documents sought to be sent for by the petitioner the Special Counsel for CBI cases would ultimately pray to dismiss the above petition confirming the order of the trial Court.

16. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both what could be assessed in the matter of the petitioner who is the third accused in C.C.No.25 of 2001 registered by the respondent herein for an offence punishable under Section 120A read with 420 IPC and under Section 13 (2) read with 13(1)(d) of the Prevention of Corruption Act and Sections 109, 420 IPC and Section 13(2) read with Section 13(1)(d) of the PC Act having filed the above criminal miscellaneous petition before the trial Court that is, the Special Court for CBI Cases/ X Additional Sessions Judge, Chennai and the said Court passing an order as per its Crl.M.P.No.108 of 2001 to the effect that at the stage of deciding the discharge application the Court should consider only documents relied upon by the prosecution and documents furnished by the prosecution has prima facie established the case against the petitioner and the other accused as well and in these circumstances the lower Court being unable to accept the contentions that the documents enumerated in the petition are vital or essential for establishing his case at this stage and in the said circumstance the Court did not find any merit in the application filed under Section 91Cr.PC and hence would ultimately dismiss the same. It is only testifying the validity of the said order passed by the trial Court, the petitioners have come forward to file the above criminal revision case seeking to set aside the said order passed by the trial Court and order issuance of summons to the persons named in the petition cause production of the documents referred to in the petition.

17. During the course of arguments the learned counsel appearing for the respondent would also cite a decision of the Honourable Apex Court reported in ((2003) 2 SCC 711) State of Orissa v. Debendra Nath Padhi wherein it is held the Honourable Apex Court referring the relevant provisions contained in the Code as well as its various decisions, including one made by

the Three Judges' Bench in Anil Kumar Bhunja CASE (19794 scc 274) wherein the Supreme Court has taken the view that there is no requirement in law that the Court at the time of framing charge should either give an opportunity to the accused to produce the evidence in defence or considering such evidence the defence may produce at that stage. The Honourable Supreme Court in further consideration of Satish Mehara case (1996 (9)SCC 766), has taken a different view and, therefore, the Honourable Supreme Court Bench holding that it would be appropriate that the matters should be referred to a larger Bench to decide the same.

18. The decision of the Honourable Supreme Court itself on the point of allowing the defence either seeking to cause production of the documents or permitting them to cause production of the same since being inconclusive and the law on the said subject is yet to be settled, this Court has to make its own decision on the subject in consideration of the facts and circumstances which are prevalent in the case and the law pertaining to the subject. However so far as the Apex Court case cited above is concerned the stage of the case was during preliminary enquiry and framing of the charges and the stage of the case in hand is not the same as it is in the Apex Court Judgment cited above but having crossed through that stage, the accused have filed the discharge petition before the trial Court and while the said discharge petition was being taken up for consideration by the trial Court, on the part of this petitioner/third accused has filed the petition seeking to summon the documents enumerated in the petition for the purpose of arguing the discharge petition and the trial Court disposing of this petition also along with the discharge petition not only dismissed this petition filed under Section 91 Cr.P.C. Seeking to summon and cause production of those documents but also the very discharge petition filed by all the accused either jointly or severally and, therefore, this case has to be viewed in different angles. 19. In the above circumstances the prime point for consideration in the circumstances of the case is, Whether while arguing a case of discharge the accused is entitled to file an application of this sort seeking for a summons to be issue under Section 91 Cr.P.C. in order to make use of the same for his arguments in the discharge petition that he has voluntarily filed in the discharge petition filed by him?

20. The discharge petition is filed by the accused at volition based on the materials made available at the moment on record since in the case in hand, the said discharge petition has been filed not only by this petitioner but also by the other accused independently after framing of the charge seeking for summoning the documents or causing production of the same before the Court or supplying the same for the accused is too much a privilege claimed on the part of the accused particularly to suit his convenience of discharge and therefore, this Court is of the view that no such luxurious prayer could be made on the aprt of the accused nor is it incumbent on the part of the Court to order those petitions and it is only proper for the accused to argue his discharge petition based on those materials made available on record at the moment since it is not the full trial that is under way for the accused to exhaust all his reme dies when the Court is expected to consider the request of the accused in summoning such documents of course depending upon the nature of the documents and the circumstances of the case.

Therefore, this Court is of the view that to substantiate the case of the accused in a discharge petition, it is absolutely unnecessary on the part of the Courts to order such an application nor is the accused entitled to claim it as of right for disposing his discharge petition. Even for making use of the documents for his purpose at the time of trial, as it has been argued on the part of the learned Special Prosecutor CBI Cases, the document No.1a, b and c, 2a and 3 could be obtained by the petitioner with the said authorities concerned applying for copy applications of the same. The documents No.4b, c and d since being connected to the writ petition in W.P.No.17419 of 1996 it could very easily be obtained by the petitioner applying for certified copies of the same and it is in fact amazing to note that the petitioner seeks these documents to be summoned by the trial Court for making use of the same for his purpose and, therefore, so far as these documents are concerned also the petitioner is not entitled to file the above petition under Section 91Cr.PC.

21. On a over all consideration of the facts and circumstances of the case encircling the above criminal revision case this Court is of the firm view that the petitioner is neither entitled to seek for these documents to be summoned either by the Court or the other side for the reasons assigned above, nor is it incumbent on the part of either the trial Court or the respondent to order summoning these documents or causing production of the same for the purpose of the petitioner, much less to argue his case of discharge, and, therefore, it has to be decided that the petitioner is not entitled to any thing claimed in the petition filed before the lower Court under Section 91 of Cr.P.C. seeking to issue summons for causing production of the documents listed in the petition. The lower Court in its order has not only assessed the existing conditions and the right of the petitioner to summon the said documents further assessing the cross examination of the said documents would ultimately decide to dismiss the petition for the reasons as extracted supra in which this Court is not able to find any error apparent on the face of the order or legal inconsistency or infirmity and, therefore, this Court is left with no option but to accept the order which is a well considered and merited one and hence, is left with no option except to confirm the order of the trial Court.

In result,

i) the above criminal revision case does not merit acceptance and becomes liable to be dismissed and is dismissed accordingly;

ii) the order dated 10.04.2003 passed in Crl.M.P.No.108 of 2001 in C.C.No.25 of 2001 by the Court of Special Judge for CBI Cases cum IX Additional Sessions Judge, Chennai is confirmed;

Consequently, connected Crl.M.P.Nos.7410 and 7411 of 2003 are dismissed.

Index: Yes
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To

1) The Ssspecial Judge for CBI Cases cum IX Addl.Sessions Judge, Chennai.
2) The Sepcial Public Prosecutor for CBI Cases, High Court, Madras.